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No.

In the

# Supreme Court of the United States

EVELYN R. KRAFT,

*Petitioner.*

*v.*

WASHINGTON MUTUAL BANK, N.A.,
CAL-WESTERN RECONVEYANCE CORPORATION,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In 1978, Congress introduced the term "annulling" into Section 362(d) of the Bankruptcy Code as a new form of relief from the statutory injunction (the "stay") imposed by Section 362(a), which prohibits post-bankruptcy petition enforcement actions against property of the bankruptcy estate. The issue of annulling the stay typically arises, as it did in this case, after a creditor has taken a post-petition enforcement action against property of the estate. The creditor then moves for an order annulling the stay to exonerate itself from the duty to undo or pay compensation for the loss caused by the enforcement action.

The Circuits all agree that the term "annulling" authorizes courts to excuse a post-petition enforcement action in appropriate circumstances. The Circuits split sharply, however, in their view of what circumstances are appropriate, posing the following three questions:

1. Whether a party resisting a motion for an order annulling the stay must show the debtor's eligibility for bankruptcy protection as a prerequisite to the applicability of the stay?

2. Whether a party moving for an order annulling an applicable stay must show one or more of inability to comply, extreme circumstances, and entitlement to prospective relief authorizing the enforcement action taken?

3. Whether an order under Section 549(c) of the Bankruptcy Code upholding a post-petition foreclosure sale to a good faith purchaser requires entry of an order annulling the stay in favor of the secured creditor that sold the property to the good faith purchaser?

## PARTIES TO THE PROCEEDING

The parties to this proceedings are petitioner Evelyn R. Kraft, an individual, and respondents Washington Mutual Bank, a national association, and Cal-Western Reconveyance Corporation, a California corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

EVELYN R. KRAFT,
Petitioner,

v.

WASHINGTON MUTUAL BANK and
CAL-WESTERN RECONVEYANCE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Evelyn R. Kraft ("Kraft") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") affirming an order entered under Section 362(d) of the Bankruptcy Code, 11 U.S.C. § 362(d).

## OPINIONS BELOW

The unreported judgment of the Ninth Circuit affirmed an unreported opinion of the United States Bankruptcy Appellate Panel for the Ninth Circuit, which, in turn, affirmed an reported order of the United States Bankruptcy Court for the Central District of California. See Appendix.

## JURISDICTION

The Ninth Circuit entered its judgment on May 13, 2002. It had jurisdiction based on 28 U.S.C. § 158(d). Kraft invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 362(d) of the Bankruptcy Code, 11 U.S.C. §362(d), authorizes courts to issue an order "annulling" the statutory injunction (the "stay") imposed by Section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a).

## BACKGROUND

This case concerns the propriety of an order annulling the stay to exonerate respondent and secured creditor Washington Mutual Bank and respondent and foreclosure trustee Cal-Western Reconveyance Corporation (collectively, "Washington Mutual") from liability for a nonjudicial foreclosure sale of real property on September 2, 1998 during the pendency of Kraft's Chapter 7 bankruptcy case. The facts are undisputed.

Kraft fell behind in payments due under a note secured by a first deed of trust in favor of Washington Mutual. Kraft filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code on February 4, 1998 in part to save her home from foreclosure. Washington Mutual did not move for relief from stay during this bankruptcy case. Because Kraft was unable to make pre-confirmation payments, the case was dismissed on April 13, 1998. The dismissal was "without 180-day bar to refiling."

On April 15, 1998, Kraft filed a second petition under Chapter 13. Kraft gave notice of her second bankruptcy to Washington Mutual. On June 15, 1998, Kraft's Chapter 13 case was converted to one under Chapter 7. Washington Mutual had notice of the conversion of the case.

On September 2, 1998, during the pendency of Kraft's Chapter 7 case, Washington Mutual sold Kraft's home at foreclosure. When the purchaser learned of Kraft's bankruptcy, it moved for and obtained relief from stay under Sections 549(c) and 362(d). The order declared that the purchaser was a bona fide purchaser with superior title to and right to possession of the property, annulled the stay retroactively to the date of the foreclosure sale as to the purchaser, and granted prospective relief from stay to take possession of the property. On January 30, 1999, Kraft's bankruptcy case was closed.

On August 30, 1999, Kraft filed an action under Section 362(h) for damages arising from the foreclosure sale in the United States District Court for the Central District of California. Washington Mutual moved for and obtained an order requiring Kraft to reopen her bankruptcy case to obtain an abandonment of the right of action from her bankruptcy estate. Once the bankruptcy case was reopened, Washington Mutual moved for and obtained an order from the bankruptcy court annulling the stay retroactive to April 15, 1998, the date when Kraft filed her second bankruptcy petition. The bankruptcy court's stated purpose in granting the order annulling the stay was to provide Washington Mutual with a defense to Kraft's Section 362(h) action.

The bankruptcy court based its order annulling the stay on "cause" under Section 362(d)(1) and on "lack of equity" under Section 362(d)(2). 9a-11a

The "cause" under Section 362(d)(1) was "bad faith" in the form of "serial filing." The finding of "bad faith serial filing" was based on the fact that Kraft's bankruptcy case was her second case and had been filed two days after the dismissal of her first case and on the fact that Kraft's second bankruptcy case was converted to one under Chapter 7. The Ninth Circuit B.A.P. in its opinion acknowledged that Kraft was eligible under Section 109(g) to be a debtor in her second case. 6a The Ninth Circuit BAP held that, under the judicially-created good-faith-filing doctrine, bankruptcy

courts have discretion to impose stricter prohibitions on serial filing than provided for in Section 109(g). The Ninth Circuit BAP explicitly rejected Kraft's interpretation of Johnson v. Home State Bank, 501 U.S. 78, 87 (1991) as barring courts from prohibiting types of serial filing not prohibited by Congress. 12a-13a

The estate's equity in Kraft's home at the time of the filing of her bankruptcy petition was approximately $37,000, at the time immediately before the foreclosure sale the estate's equity in Kraft's home was approximately $75,000, and, after the foreclosure sale to the good faith purchaser under Section 549(c), the estate's equity in Kraft's home was zero. The bankruptcy court held that, for purposes of annulling the stay, the time after the foreclosure sale was the relevant time for measuring the equity in Kraft's home.

Kraft's action for damages under Section 362(h) is stayed in the United States District Court pending the outcome of this writ petition.

## WHY REVIEW SHOULD BE GRANTED

*1. The Circuits Split Over Whether Evidence Of The Debtor's Eligibility For Bankruptcy Protection Is A Prerequisite To Applicability Of The Stay*

The Second, Sixth and Ninth Circuits hold that a bankruptcy petition filed by an ineligible debtor does not trigger the stay and that a subsequent order annulling the stay merely confirms this fact. In these Circuits, an order annulling the stay must issue unless the party resisting the motion shows that the debtor was eligible for protection under the judicially-created, good-faith-filing doctrine. Each of these Circuits has affirmed an order annulling the stay for "cause" under Section 362(d)(1) to excuse a secured creditor from responsibility for a post-petition foreclosure sale of real property on the ground that the party resisting the motion failed to show that the debtor was eligible under the good-faith-filing doctrine. *See Casse v. Key Bank N.A. (In re*

*Casse)*, 198 F. 3d 327 (2nd Cir. 1999) (Chapter 13 case was void ab initio and did not trigger the stay because the debtor was ineligibile under the good-faith-filing doctrine); *Trident Assoc. Ltd. Partnership v. Metropolitan Life Ins. Co. (In re Trident Assoc. Ltd. Partnership )*, 52 F. 3d 127 (6th Cir. 1995) (Chapter 11 case was subject to dismissal and did not trigger the stay because the debtor was ineligible under the good-faith-filing doctrine); and *Kraft v. Washington Mutual, (9a-12a) (9th Cir. BAP 2001)* (Chapter 7 case converted from Chapter 13 did not trigger the stay because the debtor failed to show "changed circumstances" between the dismissal of her first case and the filing of her second case as required for eligibility under the good-faith-filing doctrine) *aff'd without published opinion* (1a) (9th Cir. 2002). In each of *Casse*, 198 F.3d at 332, 339, 342; *Trident*, 52 F.3d at 130; and Kraft (9a-10a) at , the debtor was eligible to be a debtor under Section 109 of the Bankruptcy Code.

The First, Third and Tenth Circuits hold that the stay is automatic upon the filing of a bankruptcy petition. In these Circuits, the stay does not depend on a showing by the party resisting a motion for an order annulling the stay that the debtor was eligible for protection under the good-faith-filing doctrine. Each of these Circuits has denied a motion for an order annulling the stay to excuse a secured creditor from responsibility for a post-petition foreclosure sale of real property even where the debtor had engaged in behavior that the Second, Sixth and Ninth Circuits would characterize as "bad faith" under the good-faith-filing doctrine. *See Soares v. Brockton Credit Union (In re Soares)*, 107 F. 3d 969, 971-72, 975 (1st Cir. 1997) (stay applicable despite debtor's filing for the sole purpose of preventing the foreclosure sale of his home and despite debtor's failure to oppose creditor's motion for relief from stay so as to alert the creditor of debtor's intent to attack a foreclosure judgment as violating the stay); *Ward. v. Bowest*, 837 F. 2d 124 (3rd. Cir. 1988) (stay applicable despite serial filing by husband and wife for purpose of recovering home sold at foreclosure in husband's prior bankruptcy); and *Pro Finance Inc. v. Spriggs (In re Spriggs)* 219 B.R. 909 (10th Cir. BAP 1998) (stay applicable

despite serial filing of three petitions in different counties for purpose of preventing foreclosure sale of home and despite debtor's failure to respond to foreclosure notices and to notify creditor of bankruptcy so as to alert creditor of intent to rely on stay), *aff'd without published opinion* (10th Cir. 1998).

Discussing the implications of the position taken by the Second, Sixth and Ninth Circuits, the Fifth and Eighth Circuits have rejected the notion that a bankruptcy petition filed by an ineligible debtor does not trigger the stay. The Fifth and Eighth Circuits note that such a rule makes eligibility an issue of subject matter jurisdiction with the potential for far-reaching, unanticipated negative consequences. *See Promenade National Bank v. Phillips (In the Matter of Phillips)*, 844 F 2d. 230, 235 n.2 (5th Cir. 1988) (disagreeing with opinions of bankruptcy courts in various circuits that held there was no subject matter jurisdiction in cases commenced by ineligible debtors) and *Rudd v. Laughlin*, 866 F. 2d 1040, 1042 (8th Cir. 1989). In the Fifth and Eighth Circuits, courts have subject matter jurisdiction over cases filed by debtors ineligible to be a debtor under Section 109 and the filing of such cases triggers the stay. *See Moran v. Frisard (In the Matter of Ulmer)*, 19 F. 3d 234, 234-35 (5th Cir. 1994) and *In re Henstra*, 75 B.R. 260 (Bankr. D. Minn. 1986) (dismissing case due to debtor's lack of eligibility under Section 109(e), but refusing to grant an order annulling the stay to validate a post-petition foreclosure sale). The Fifth Circuit has not been entirely consistent in this position. *See Rowe v. Owen Federal Bank & Trust (In re Rowe)*, 220 B.R. 591, 595 (E.D. Tex. 1997) (holding that a post-petition foreclosure sale was valid because the bankruptcy case filed by an ineligible debtor did not trigger the automatic stay), *aff'd without published opinion*, 178 F. 3d 1290 (5th Cir. 1999). The Second Circuit has adopted the *Rowe* view on the effect of the debtor's ineligibility as "established authority." *See Casse*, 198 F.3d at 342, and *FDIC v. Cortez*, 96 F. 3d 50, 51 (2nd Cir. 1996).

A debate rages over whether courts have discretion to impose good-faith-filing eligibility requirements not explicitly stated in the Bankruptcy Code. For example, the Tenth Circuit has held that courts may not bar any form of serial filing that is permitted under Section 109(g) of the Bankruptcy Code. *Frieouf v. U.S. (In re Frieouf)*, 938 F 2d 1099, 1103 n.4, 1104(10th Cir. 1991), *cert. denied* 502 U.S. 1091 (1992). The Second Circuit in *Casse* strongly disagreed, calling the Tenth Circuit's rejection of the good-faith-filing doctrine a "perverse" construction of the Bankruptcy Code. *Casse* 198 F.3d at 346.

Courts disagree over whether *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), *Toibb v. Radloff*, 501 U.S. 157 (1991), and *Home State Bank*, 501 U.S. at 87, prohibited courts from imposing good-faith-filing eligibility requirements not explicitly stated in the Bankruptcy Code. For example, the Sixth Circuit in *Trident Assoc. Ltd. Partnership* upheld the good-faith-filing doctrine, rejecting the argument of a debtor opposing a motion for an order annulling the stay that *Taylor* and *Toibb* overruled the good-faith-filing doctrine. *Trident Assoc. Ltd. Partnership*, 52 F.3d at 103-131. A bankruptcy court in the First Circuit reached the opposite view, holding that *Toibb* obviously overruled the good-faith-filing doctrine. *In re Victoria Ltd. Partnership*, 187 B.R. 54, 61 (Bankr. D. Mass. 1995). The Ninth Circuit BAP *in Kraft v. Washington Mutual* (12a-13a) rejected *Kraft's* argument that *Home State Bank* had overruled the good-faith-filing doctrine. A bankruptcy court in the Third Circuit reached the opposite view, holding that, after *Home State Bank*, there is no good-faith-filing requirement: "The problem of abusive multiple filings is addressed by 11 U.S.C § 109(g), and cases not within the precise bounds of that Code section are simply not prohibited." *In re Oglesby*, 161 B.R. 917, 924 (Bankr. E.D. Pa. 1993).

The outcome of the eligibility controversy was central to the decision in Kraft's case. The order annulling the stay to validate Washington Mutual's September 2, 1998 foreclosure sale of Kraft's home during the pendency of her Chapter 7

case turned on the fact that Kraft could not show "changed circumstances" between the dismissal of her first Chapter 13 case on April 13, 1998 and the filing of her second Chapter 13 case on April 15, 1998 and on the fact that Kraft's second case was converted to one under Chapter 7 on June 15, 1998. The Ninth Circuit took these two facts as proof of "bad faith serial filing" under the judicially-created good-faith-filing doctrine and therefore "cause" for annulling the stay under Section 362(d)(1). 9a-10a Both of these so-called "bad faith" acts are explicitly permitted by the Bankruptcy Code. Section 109(g) permits refiling where, as in Kraft's case, there is no 180-day bar to refiling entered in the prior case and no motion for relief from stay filed in the prior case. Section 1307 permits a debtor to convert a Chapter 13 case to one under Chapter 7 at any time. In the First, Third, Fifth, Eighth and Tenth Circuits, these two facts would have been irrelevant and certainly not "cause" to excuse Washington Mutual from responsibility for selling property of the estate during the pendency of Kraft's Chapter 7 case.

*2. The Circuits Split Over Whether A Party Moving For An Order Annulling An Applicable Stay Must Show One Or More Of Inability To Comply, Extreme Circumstances, And Entitlement To Prospective Relief Authorizing The Enforcement Action Taken*

The First and Tenth Circuits require a party moving for an order annulling an applicable stay to show inability to comply. *See Soares*, 107 F. 3d at 977 (1st Cir. 1997) (reversing order annulling the stay in favor of a creditor that had prior notice of the stay, holding that the creditor should have complied with the stay and should have applied for prospective relief) and *Franklin Savings Ass'n v. Office of Thrift Supervision*, 31 F 3d 1020, 1023 (10th Cir. 1994) (affirming denial of motion for order annulling the stay in favor of creditor that had prior notice of the stay, holding that the creditor should have complied with the stay and should have applied for prospective relief).

The Seventh, Ninth, and Eleventh Circuits do not require a party moving for an order annulling the stay to

show inability to comply. *See Matthews v. Rosene*, 739 F. 2d 249, 251 (7th Cir. 1984) (affirming order annulling the stay in favor of a creditor that had notice of the stay and could have sought prospective relief, but that, instead, litigated a counterclaim in state court to judgment and enforced the judgment without informing the state court of the stay); *National Environmental Waste Corp. v. Riverside (In re National Environmental Waste Corp.)* 129 F. 3d 1052, 1055 (9th Cir. 1997) (affirming order annulling the stay in favor of a creditor that had notice of stay and could have obeyed it, holding that, while ability to comply is a factor to weigh, it is not dispositive and debtor's failure to warn creditor of violation of stay shifted balance of equities in favor of creditor), *cert. denied* 524 U.S. 952 (1998); and *U.S. v. Ruff (In re Rush-Hampton Industries, Inc.)*, 98 F.3d 614 (11th Cir. 1996) ("we fail to see how the allowance of post-petition interest would 'reward' the IRS for the offset prior to the bankruptcy court's granting of relief from the automatic stay as the IRS would have been entitled to post-petition interest had it taken timely action to lift the stay").

The First, Seventh and Tenth Circuits require a party moving for an order annulling an applicable stay to show extreme circumstances. *Soares*, 107 F. 3d at 977 (1st Cir. 1997) (holding that a "rarely dispensed remedy like retroactive relief from the automatic stay must rest on a set of circumstances that is both unusual and unusually compelling"); *Matthews*, 739 F. 2d at 251 (7th Cir. 1984) ("Suspension of Section 362 automatic stay provisions may be consonant with the purposes of the Bankruptcy Act when equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems."); and *Franklin Savings Ass'n*, 31 F 3d at 1023 (10th Cir. 1994) (describing an order annulling the stay as a "rare result") and *Pro Finance, Inc.*, 219 B.R. at 912-913 (10th Cir. B.A.P. 1998) (holding that debtor's negligence in giving notice of the stay did not rise to the standard of "stealth silence" in which an order annulling the stay is justified by the debtor withholding notice of the stay for an ulterior purpose and thus causing the creditor's inability to comply

with the stay), *aff'd without published opinion* (10th Cir. 1998).

The Third, Ninth and Eleventh Circuits do not require a party moving for an order annulling an applicable stay to show extreme circumstances. *Prudential Savings Bank v. Siciliano (In re Siciliano)*, 13 F. 3d 748, 751-52 (3rd Cir. 1993) (reversing denial of order annulling stay in favor of a creditor that foreclosed without notice of the stay and remanding for a determination whether the creditor could have met the standard for prospective relief under Section 362(d)(2) with instructions to grant the order annulling the stay if the creditor could have met the Section 362(d)(2) standard; *Kraft v. Washington Mutual*, (10a) (9th Cir. BAP 2001) ("extreme circumstances" is only one of many factors to be considered in balancing the equities and not a "strict requirement") (citing *National Environmental Waste Corp.*,129 F. 3d at 1055); and *Ruff*, 98 F. 3d. at 617 (11th Cir. 1996) (holding that a "harmless violation of the automatic stay [did not] suffice to deprive the IRS of the post-petition interest setoff to which by law undoubtedly it would have been entitled had it first sought a lifting of the stay from the bankruptcy court").

The First, Third, and Eleventh Circuits require a party moving for an order annulling an applicable stay to show entitlement to prospective relief authorizing the enforcement action taken. *See Soares*, 107 F. 3d at 977 (1st Cir. 1997) (holding that entitlement to prospective relief is a necessary but not a sufficient condition); *Siciliano*, 13 F. 3d at 751-52 (3rd Cir. 1993) (holding that relief annulling the stay would be appropriate if creditor could show that it met standard for prospective relief under Section 362(d)(2)); and *Ruff*, 98 F. 3d. at 617 (11th Cir. 1996).

The Ninth Circuit does not require a party moving for an order annulling an applicable stay to show entitlement to prospective relief authorizing the enforcement action taken. *Kraft v. Washington Mutual*, (10a) (9th Cir. BAP 2001) ("entitlement to prospective relief" is only one of many

factors to be considered in balancing the equities and not a "strict requirement") (citing *National Environmental Waste Corp.*,129 F. 3d at 1055).

The Federal Circuit has a completely different approach. In *Bronson v. U.S.*, 46 F. 3d 1573, 1581-1582 (Fed. Cir. 1995), the Circuit held that post-petition tax penalties assessed by the IRS with notice of the stay were valid because the debtor had failed to move to "avoid" the assessment. *Bronson*, 46 F. 3d at 1577-78, explained that, by introducing the term "annulling" in Section 362(d), Congress had overruled *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940), which held that all acts taken in violation of the stay are void. According to *Bronson*, post-petition enforcement actions are now merely "voidable" and the burden is on the party harmed by a post-petition enforcement action to bring a motion to avoid the action. *Bronson*, 46 F. 3d at 1577-78. Bronson discusses the split among the Circuits regarding whether post-petition enforcement actions are "void" or merely "voidable" and aligned itself in the "voidable" camp with the Fifth, Sixth and Seventh Circuits and opposed the view of the "void" camp consisting of the First, Second, Third, Ninth, Tenth and Eleventh Circuits. *Bronson*, 46 F. 3d at 1577 and n. 11, 12, 13 and 14. A dissenting opinion by Circuit Judge Mayer opined that the term "annulling" did not overrule *Kalb* and that the burden remains on the creditor violating the stay to seek an order annulling the stay to validate the action taken in violation of the stay. *Bronson*, 46 F. 3d at 1582.

The First Circuit also noted the split among the Circuits regarding whether post-petition enforcement actions are "void" or merely "voidable." *Soares*, 107 F.3d at 976. The First Circuit pointed out that "this semantic difference has practical consequences because the characterization of an infringing action as 'void' or 'voidable' influences the burden of going forward." Id. Relying on *Kalb*, the First Circuit held that in order to secure the important protections of the automatic stay, courts must display a "certain rigor" in reacting to violations of the automatic stay. The First Circuit held that: "Treating an action taken in contravention of the

stay as void places the burden of validating the action after the fact squarely on the shoulders of the offending creditor." *Soares*, 107 F. 3d at 976.

The outcome of the burden controversy was central to the Ninth Circuit's decision in Kraft's case. Washington Mutual was able to comply with the stay, but did not. The Ninth Circuit held that this fact was a "factor," but not dispositive. Washington Mutual did not show any extreme circumstances. The Ninth Circuit held that this fact was a "factor," but not dispositive. Washington Mutual admits that Kraft's estate had equity in the property immediately before the foreclosure sale. The Ninth Circuit held that the outcome of a hypothetical motion for prospective relief under Section 362(d)(1) or Section 362(d)(2) was irrelevant to the question whether Washington Mutual was entitled to an order annulling the stay, and held, in the alternative, that Kraft's lack of equity after the foreclosure sale required retroactive relief annulling the stay. 10a-11a

*3. Courts Disagree Over Whether An Order Under Section 549(c) Of The Bankruptcy Code Upholding A Post-Petition Foreclosure Sale To A Bona Fide Purchaser Requires Entry Of An Order Annulling The Stay In Favor Of The Secured Creditor That Sold The Property To The Bona Fide Purchaser*

Section 549(a) of the Bankruptcy Code empowers the trustee of a bankruptcy estate to set aside a sale of real property held in violation of the stay. Section 522(h) authorizes debtors to exercise the trustee's avoiding power. Section 549(c) states an exception to the trustee's avoiding power: the trustee may not avoid a sale of real property to a "good faith purchaser" defined as one that has no knowledge of the bankruptcy case and that pays present fair equivalent value.

Courts are unsure how to reconcile the rule that post-petition foreclosure sales to good faith purchasers are unavoidable under Section 549(c) with the rule that post-petition enforcement actions are "void" or "voidable" under

*Kalb* and Section 362(a). Some courts view Section 549(c) as an exception to the stay that exempts the entire transaction. *E.g., Schwartz v. U.S. (In re Schwartz)*, 954 F. 2d 569, 574 (9th Cir. 1992) (characterizing Section 549(c) as an "exception to the automatic stay" in holding that post-petition tax assessment was void). Under this transactional view, neither the good faith purchaser nor the secured creditor seller violates the stay by participating in a foreclosure sale of property of the estate that is exempt under Section 549(c). See *Kraft v. Washington Mutual*, (8a, 11a, 14a) (9th Cir. BAP 2001) (suggesting as an alternative holding that the bankruptcy court's order under Section 549(c) exempting the good faith purchaser from the trustee's avoiding power and annulling the stay to the date of the foreclosure sale as to the purchaser also excused the secured creditor seller from liability for its participation in the post-petition foreclosure sale with notice of the stay).

Other courts view the trustee's avoiding power under Section 549(a) as a remedy. *E.g., Ward*, 837 F. 2d 124, 126 (3rd Cir. 1987) (describing Section 549(c) as a statutory exception to the avoidability of a sale). Under this view, the loss of the avoiding power as a remedy as to the good faith purchaser does not exempt the secured creditor seller and its agents from liability in an action for civil contempt or for statutory liability under Section 362(h). *See Administrator of Veterans Affairs v.Bernard (In re Bernard)*, 21 B.R. 287, 288 and n. 11 (Bankr. E.D. Pa 1982) (suggesting the availability of a contempt action despite unavoidability of the sale as follows: "While the sheriff's actions in issuing the deed after the debtor's filing may be punishable by contempt, if it was a knowing violation of the automatic stay provisions of the Code, that does not change the result under § 549(c)").

Foreclosure sales to buyers that may qualify as good faith purchasers under Section 549(c) appear in reported decisions and likely occur in many cases without reported decisions. For example, in the Central District of California alone, the following reported opinions involve foreclosure sales where the court discussed whether the buyer qualified

as a good faith purchaser under Section 549(c). *Tsafaroff v. Taylor (In re Taylor)*, 884 F.2d 478 (9th Cir. 1989), *Walker v. California Mortgage Service (In re Walker)*, 861 F.2d 597 (9th Cir. 1988), *Little v. Bago (In re Bago)*, 149 B.R. 610 (Bankr. C.D. Cal. 1993), *Little v. Duncombe (In re Duncombe)*, 143 B.R. 243 (Bankr. C.D. Cal. 1992), and *Williams v. United Investment Corp. (In re Williams)*, 124 B.R. 311 (Bankr. C.D. Cal. 1991). The loss of estate property to a bona fide purchaser is most likely to occur and the need for a remedy is greatest in those cases such as Kraft's where the estate has a large amount of equity in the property right before the post-petition foreclosure sale. It is in those cases that a buyer without notice is most likely to be the purchaser.

The outcome of the controversy over whether Section 549(c) creates a transactional exception to the stay or merely exempts a good faith purchaser from the remedy under Section 549(a) known as the trustee's avoiding power was central to the Ninth Circuit's alternative holding in Kraft's case.

## WHY THE DECISION BELOW WAS WRONG

### *1. Evidence Of The Debtor's Eligibility For Bankruptcy Protection Is Not A Prerequisite To The Applicability Of The Stay*

Congress intended the stay to be "automatic" upon filing. *See* Section 362(a). Only the continuance of the stay depends on the eligibility of the debtor and courts may lift the stay only *after* affording appropriate notice and a hearing. *See* Sections 305, 707, 1307. Eligibility is not jurisdictional. *E.g.*, *Phillips*, 844 F.2d at 235 n. 2 (5th Cir. 1988) and *Carr v. Security Sav. & Loan Ass'n*, 130 BR 434, 438 (D. N.J. 1991) ("Congress, if it wished, could have created an exception to the automatic stay where successive petitions are filed, but it did not."). Treating eligibility as jurisdictional will force creditors to make their own determination as to whether a bankruptcy filing triggered the stay and to jump the gun so as not to be left behind in the race of creditors that the filing

may or may not have stopped. Treating eligibility as jurisdictional delegates to creditors the judicial power to determine the validity of injunctions that the Constitution and Congress intended to grant only to courts. Walker v. City of Birmingham, 388 U.S. 307, 320-321 (1967) (requiring party subject to an injunction to seek review prior to violation the injunction, stating that "in the fair administration of justice, no man can be judge in his own case, however exalted his station, however righteous his motives").

Courts are not free to create eligibility requirements that prohibit types of serial filing not prohibited by Congress. *See Home State Bank*, 501 U.S. at 87.

The Ninth Circuit erred by imposing on Kraft the burden of showing "changed circumstances" between the dismissal of her first Chapter 13 case "without 180-day bar" on April 13, 1998 and the filing of her second Chapter 13 case on April 15, 1998 and the burden of explaining the conversion of her Chapter 13 case to one under Chapter 7 on June 15, 1998. The refiling was explicitly permitted by Section 109(g) and the conversion by Section 1307. The Ninth Circuit was not free to penalize Kraft and the other constituents of her bankruptcy estate for exercising rights provided by Congress.

*2. A Party Moving For An Order Annulling An Applicable Stay Must Show All Of Inability To Comply, Extreme Circumstances, And Entitlement To Prospective Relief Authorizing The Enforcement Action Taken*

The "well established rule that 'persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order' applies in bankruptcy cases." *Celotex Corp. v. Edwards*, 514 U.S. 300, 306 (1995) (citation omitted). Because Washington Mutual had notice of Kraft's bankruptcy case, it had a duty to seek prospective relief from stay to conduct its foreclosure sale. Instead, Washington Mutual sold property of the estate without seeking prospective relief and only earnestly sought relief from stay after Kraft sued for statutory damages under

Section 362(h). Under the general law of injunctions, "once a prima facie showing of violation has been made, the charged party has the burden of proving inability to comply." *See* 11A Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d § 2960 (1995). The standard for obtaining an order annulling the stay as a defense to a statutory contempt action should be no less onerous on the violator.

A party moving for an order annulling an applicable stay must show "extreme circumstances" because an order annulling the stay necessarily deprives the debtor and other constituents of the bankruptcy estate of property without a predeprivation hearing. *See U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'") (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972)). A contrary rule would also effectively abolish Section 362(f) and Bankr. Rule 4001, which require a showing of immediate irreparable harm as a precondition to obtaining relief without affording prior notice and an opportunity to be heard to the debtor and other constituents of the bankruptcy estate.

A party moving for an order annulling an applicable stay must show entitlement to prospective relief authorizing the enforcement action taken. Otherwise, creditors have little reason not to violate the stay first and seek forgiveness under the more lenient standard for annulling the stay later.

The Ninth Circuit erred by not requiring Washington Mutual to show each of these three requirements as a precondition to the order annulling the stay entered for the express purpose of absolving Washington Mutual of responsibility to compensate Kraft and her estate for the loss caused by the foreclosure sale conducted during the pendency of her Chapter 7 case.

*3. An Order Under Section 549(c) Of The Bankruptcy Code Upholding A Foreclosure Sale To A Good Faith Purchaser Did Not Require Entry Of An Order Annulling The Stay In Favor Of The Secured Creditor That Sold The Property*

The purpose of the exemption from the trustee's avoiding power for good faith purchasers under Section 549(c) is to minimize the degree to which bankruptcy law interferes with state law real property recording laws and to avoid discouraging bidders from attending foreclosure sales of real property. Successful bidders that subsequently lose to trustees of unknown bankruptcy cases may be discouraged from bidding at future foreclosure sales, resulting in lower foreclosure auction prices to the general detriment of debtors, unsecured creditors, and junior secured creditors.

Nothing in Section 549(c) indicates that Congress enacted it to give the clever creditor an opportunity to launder an intentional violation of the stay in the innocence of the good faith purchaser. The better view is that Section 549(c) only curtails the remedy of the trustee's Section 549(a) avoiding power, not the alternative remedy of an action for civil contempt or for statutory damages under Section 362(h). The Ninth Circuit erred in suggesting that the innocence of the good faith purchaser of Kraft's home required entry of an order annulling the stay to absolve Washington Mutual of responsibility to compensate Kraft and her estate for the loss caused by the foreclosure sale conducted during the pendency of her Chapter 7 case.

## CONCLUSION

For these reasons, Kraft respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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*Attorney for Petitioner*

(Any footnotes trail end of each document)

No. 01-55637
CT/AG#: CC-00-01447-BMaP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: EVELYN R. KRAFT,
Debtor

EVELYN R. KRAFT,
Appellant,

v.

CAL-WESTERN RECONVEYANCE CORPORATION;
WASHINGTON MUTUAL BANK, N.A.,
Appellees.

JUDGMENT

APPEAL FROM the United States Bankruptcy Appellate Panel of the Ninth Circuit.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States Bankruptcy Appellate Panel of the Ninth Circuit and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said Bankruptcy Appellate Panel in this cause be, and hereby is AFFIRMED.

Filed and entered May 13, 2002

No. 01-55637
B.A.P. No. CC 00-1447 BMaP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: EVELYN R. KRAFT,
Debtor

EVELYN R. KRAFT,
Appellant,

v.

CAL-WESTERN RECONVEYANCE CORPORATION;
WASHINGTON MUTUAL BANK, N.A.,
Appellees.

Filed May 13, 2002

MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Brandt, Marlar, and Perris, Bankruptcy Judges, Presiding

Submitted March 14, 200**
Pasadena, California

Before: KOZINSKI and GOULD, Circuit Judges, and CEBULL,*** District Judge.

After careful consideration of the record and briefs, we affirm the decision of the Bankruptcy Appellate Panel filed March 15, 2001, for the reasons given by the Bankruptcy Appellate Panel in its memorandum decision.

AFFIRMED.

Footnotes

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Richard F. Cebull, United States District Judge for the District of Montana, sitting by designation.

BAP NO. CC-00-1447-BMaP
BK NO. LA 98-24815 EC

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: EVELYN R. KRAFT
Debtor

EVELYN R. KRAFT,
Appellant

v.

CAL-WESTERN RECONVEYANCE CORPORATION;
WASHINGTON MUTUAL BANK, N.A.,
Appellees.

Filed March 15, 2001

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for the Central District of California

THIS CAUSE came on to be heard on the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is AFFIRMED.

FOR THE PANEL,
Nancy B. Dickerson,
BAP Clerk

By: Edwina Clay Deputy Clerk

BAP NO. CC-00-1447-BMaP
BK NO. LA 98-24815 EC

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: EVELYN R. KRAFT,
Debtor

EVELYN R. KRAFT,
Appellant,

v.

CAL-WESTERN RECONVEYANCE CORPORATION;
WASHINGTON MUTUAL BANK, N.A.,
Appellees.

MEMORANDUM fn1

Argued and Submitted on February 22, 2001
at Pasadena, California

Filed March 15, 2001

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Ellen A. Carroll, Bankruptcy Judge, Presiding

Before: BRANDT, MARLAR, and FERRIS, Bankruptcy Judges

Debtor Evelyn R. Kraft ("Kraft") appeals the bankruptcy court's order granting retroactive annulment of the automatic stay to Cal-Western Reconveyance Corporation ("CWR") and Washington Mutual Bank, N.A. ("WMB"). We AFFIRM.

I. FACTS

Kraft filed a chapter 13 fn2 petition on 4 February 1998, the day before a scheduled non-judicial foreclosure sale of her residence at 3604 West Estates Lane, Unit 315, Palos Verdes, California. Her plan called for monthly payments of $452.32; she made only one $50 payment on 13 April 1998 the case was dismissed, without prejudice, for failure to make plan payments. Kraft filed a second chapter 13 petition two days later, one week prior to a continued foreclosure sale. The schedules filed in the second case were identical to those in the first. She made no plan payments in this second case, nor did she appear at the § 341 meeting. On 15 June 1998, after the chapter 13 trustee had submitted a proposed order for dismissal with a 180-day bar to refiling, Kraft converted her case to chapter 7.

On 2 September 1998, without obtaining relief from the automatic stay, CWR conducted a foreclosure sale of Kraft's residence on behalf of WMB. CWR and WMB were both aware of debtor's bankruptcy filing but, according to CWR, one of its employees had misread the PACER (Public Access to Court Electronic Records) report items "Order discharging chapter 13 panel trustee and exonerate bond liability" and "Final, report of trustee in asset case" as meaning the discharge had been entered. WR conducted the sale believing the stay was no longer in effect. Diversified Properties, Inc. ("Diversified") purchased the property *at* the foreclosure sale for $98,500.

Upon realizing it had conducted the sale in violation of the stay, CWR recorded a rescission of the trustee's deed. When Diversified learned of Kraft's pending bankruptcy case, it sought annulment of the automatic stay retroactive to the sale date. WMB concurrently brought a motion to invalidate the sale. The bankruptcy court granted Diversified's motion and denied WMB's, entering written orders on 31 December 1999 (the first order is in the excerpts of record provided to us; the second was not included). Kraft did not appeal either order. CWR rescinded its previously-recorded Rescission of

the Trustee's Deed Upon Sale.

Kraft received her discharge on 19 October 1998, and her case closed on 29 January 1999. Seven months later she filed an action for damages in the United States District Court for the Central District of California, alleging a claim against WMB and CWR under § 362(h) for willful violation of the automatic stay. CWR moved to dismiss the action, arguing that Kraft lacked standing. The district court stayed the action while Kraft reopened her case and obtained an order of abandonment.

On 27 June 2000 WMB and CWR moved for annulment of the stay, retroactive to the date of filing. The bankruptcy court granted the motion over Kraft's objection, entering an order on 26 July 2000. This appeal ensued.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and 157(b) (1), and we do under 28 U.S.C. § 158(c).

III. ISSUE

A. Whether this appeal is moot.

B. Whether the bankruptcy court abused its discretion in granting appellee's motion for retroactive annulment of the stay.

IV. STANDARD OF REVIEW

We review a decision to annul the automatic stay retroactively for abuse of discretion. Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.), 129 F.3d 1052, 1054 (9th Cit. 1997). A finding of bad faith is a factual determination reviewed for clear error. Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 938 (9th Cir. BAP 1997), aff'd, 171 F.3d 1219 (9th Cir. 1999).

V. DISCUSSION

A. Mootness

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case[s] before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971) (citation omitted) . An issue is moot when the court cannot fashion a remedy for the wrong. Gun v. Boni (In re Boni), 240 B.R. 381, 384-85 (9th Cir. BAP 1999) (citing In re Spirtos, 992 F.2d 1004, 1006 (9th Cir. 1993)

When CWR and WMB sought relief, the stay had already been annulled to validate the sale to Diversified, raising a question as to whether retroactive annulment was even necessary for CWR and WMB. If not, we would be unable to fashion effective relief, as none would be necessary, and this appeal would be moot. Accordingly, we ordered briefing on whether there could be a willful violation of stay, previously annulled on motion of another party. Both parties responded.

Kraft contends, without citation to authority, that relief from stay is effective only as to the moving party. CWR and WMB cite no pertinent authority either, and we have not located any.

Kraft points out that the bankruptcy court granted relief to Diversified exclusively because of its status as a bona fide purchaser under § 549(c), Tr., 19 April 2000, p. 10. In addition, the judge noted during the hearing on Diversified's motion that if she did annul the stay, it would be as to Diversified only, and not for WMB. Tr., 17 November 2000, p. 6. Kraft argues that the appeal is not moot, because reversal will "restore" her claim for damages under § 362(h). Further, the (form) order annulled the stay retroactively under § 362(d) (1) and (d) (2) "[a]s to Movant, its successors, transferees and assigns." The court's oral remarks support this conclusion.

Assuming (without deciding) the order was effective only as to Diversified, appellees could still theoretically be liable for

a willful violation of the stay absent affirmance of the order on appeal. Counsel for CWR and WMB readily admits the sole purpose for seeking retroactive annulment was defense of the district court action. The relief Kraft would gain from reversal is that her action may go forward.

As will be seen, we need not (and do not) resolve the question of whether the stay is unitary, but Kraft's rights are affected, and we will not dismiss the appeal as moot.

B. Retroactive Annulment of the Stay

A petition in bankruptcy operates as a stay against acts affecting property of the bankruptcy estate. 362(a). Actions taken in violation of the automatic stay are void, Nat'l Envtl Waste, 129 F.3d at 1054 (citing In re Schwartz, 954 F.2d 569, 571-72 (9th Cir. 1992)), but bankruptcy courts have wide latitude in fashioning relief from the automatic, stay, and power to annul it retroactively, validating acts otherwise violating the stay. Boni, 240 B.R. at 384. Whether retroactive annulment is warranted is determined on a case-by-case basis, Nat'l Envtl. Waste, 129 F.3d at 1055, (calling for balancing of the equities).

Lack of good faith in filing a chapter 13 plan may be "cause" to annul the stay retroactively. See Blatnick v. Sanders (In re Sanders), 198 B.R. 326, 329 (Bankr. S.D. Cal. 1996) and In re Powers, 135 B.R. 980, 998 (Bankr. C.D. Cal. 1991). Successive chapter 13 filings do not constitute bad faith per se, but "successive filings may be examined together and the result achieved by such filings reviewed against the statutory requirements." Downey Sav. & Loan Ass'n v. Metz (In re Metz), 820 F.2d 1495, 1497 (9th Cir. 1987). A bona fide change in circumstances may justify a successive filing. See id. at 1498.

The bankruptcy judge granted the motion to retroactively annul the stay, finding that, had relief been sought at the time of the foreclosure sale, she would have granted it "in a flash." Tr., 25 July 2000, p. 7. The court found that Kraft's filing of a

second chapter 13 petition absent changed circumstances, and her later conversion to chapter 7 to avoid the trustee's motion to dismiss, was bad faith conduct warranting retroactive annulment. The court further found that the stay violation did not appear to have been willful, noting WMB had attempted to rescind the sale.

Kraft neither argued nor cited evidence that her second chapter 13 plan was filed in good faith. Indeed, she is precluded from making such an argument: the order annulling the stay as to Diversified included extraordinary relief (180-day transfer injunction and provision that order be effective in any bankruptcy case filed by or against debtor's successor's transferees, or assignees for 180 days) and was "[b]ased upon evidence of efforts by Debtor(s) or others acting in concert with Debtor(s) to delay, hinder, or defraud Movant by abusive bankruptcy filings[.]." That order was not appealed.

Kraft instead argues that a creditor seeking retroactive relief from stay must show three elements, not proven here: (1) entitlement to the relief taken had the creditor applied for relief prospectively; (2) the creditor's inability to comply with the stay; and (3) "extreme circumstances" shifting the balance of equities in favor of the creditor, citing Matava v. Kissinger (In re Kissinger), 72 E.3d 107 (9th Cir. 1995); Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.), 749 F.2d 670 (11th Cir. 1984); Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969 (1st Cir. 1997); and Blatnick v. Sanders (In re Sanders), 198 B.R. 326 (Bankr. S.D. Cal. 1996). None of these cases sets forth specific "elements" that must be proven to warrant retroactive relief. In the Ninth Circuit, these elements are factors to be considered, not strict requirements: courts are to determine each case on its own facts. See Nat'l. Envtl. Waste, 129 F.3d at 1055.

Respecting the first factor, Kraft argues that prospective relief would not have been warranted, because the evidence showed she had between $36,634.55 and $75,000 of equity in her real property. However, the bankruptcy judge indicated

she would have granted relief "in a flash" had it been requested earlier. Lack of good faith, not adequate protection, was the "cause" upon which the bankruptcy court relied; equity in the property is relevant only to the extent it may be a factor to consider in balancing the equities. Further, the order granting relief to Diversified was predicated, in part, on § 362(b) (1) the debtor's lack of equity.

On the second point, Kraft reads Kissinger and Albany Partners as imposing a requirement that, where a stay violation is willful, the creditor must show an inability to comply with the stay before retroactive relief is warranted. In Kissinger, the stay violation occurred when a state court judge sent the creditor's case to the jury. The Ninth Circuit upheld retroactive annulment in part because the "failure to obey the stay was caused by the state court judge, not the creditor." 72 F.3d at 109. In Albany Partners, the Eleventh Circuit upheld retroactive annulment validating a foreclosure sale where the creditor, although notified of the bankruptcy filing, proceeded with foreclosure in reliance on a prior judicial determination that the subject property did not belong to the debtor.

Kissinger and Albany Partners merely demonstrate the balancing courts do in determining whether retroactive annulment is appropriate. Those cases do not impose a bright line rule that the creditor must show inability to comply with the stay.

Finally, Kraft argues that appellees failed to show extreme circumstances shifting the equities in their favor. She contends that any harm to CWR or WMB was a consequence of their own wrong in violating the stay. As part of this argument, she claims the bankruptcy court erroneously placed on Kraft and the Chapter 7 trustee the burden of showing the estate was entitled to the benefit of the stay as a precondition to recovering for loss of property of the estate. Her citation to the record does not shed any light on what this argument means, but if it means she disputes that she had the burden of coming forth with evidence to refute

CWR's and WMB's allegations of bad faith, she is mistaken. The debtor has the burden of showing good faith when that issue is raised as "cause" for granting relief from stay. § 362(g); United Enters., Ltd. v. ACI Sunbow LLC (In re ACI Sunbow, LLC), 206 B.R. 213, 217 (Bankr. S.D. Cal. 1997).

Kraft next argues that, to obtain relief from stay based on bad faith serial filings, a creditor must prove that the debtor filed her petition in violation of § 109(g), which prohibits refiling for 180 days after dismissal either (1) for willful failure to abide by a court order; or (2) after voluntary dismissal following filing of a request for relief from stay. In support of this argument Kraft cites In re Oglesby, 161 B.R. 917, 924 (Bankr. E.D. Pa. 1993); Matter of Marlatt, 116 B.R. 703, 707 (Bankr. 0. Neb. 1990); In re Samuel, 77 B.R. 520, 521 (Bankr. E.D. Pa. 1987); In re Surace, 52 B.R. 868, 871 Bankr. C.D. cat. 1985); and Johnson v. Home State Bank, 501 U.S. 78, 87 (1991). None of these cases involves a motion for retroactive annulment, or even stay relief, and we find no Ninth Circuit authority requiring such proof. If anything, the cited cases cut against Kraft's position.

Kraft quotes from Johnson:

Congress has expressly prohibited various forms of serial filings. See, e.g., 11 U.S.C. § 109(g) (no filings within 180 days of dismissal) § 727(a) (8) (no Chapter 7 filing within six years of a Chapter 7 or Chapter 11 filing); § 727(a) (9) (limitation on Chapter 7 filing within six years of Chapter 12 or Chapter 13 filing) . The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief. Cf. United States v. Smith, 499 U.S. 160, 167, 111 S. ct. 1180, 1185, 113 L. Ed. 2d 134 (1991) (expressly enumerated exceptions presumed to be exclusive)

501 U.S. at 87. She admits that language is dicta; it merely notes that Congress expressly prohibited certain types of serial filings in § 109(g) but did not prohibit serial filings of chapter 7 and chapter 13 petitions.

Next, Kraft argues that § 362(h) limits the bankruptcy court's discretion to annul the stay retroactively. Again, she cites no authority directly supporting this argument, but reasons that, because damages under § 362(h) are mandatory upon a finding of a willful stay violation, citing Ramirez v. Fuselier (In re Ramirez), 183 E.R. 563, 567 (9th Cir. BAP 1995), the bankruptcy court had no discretion to nullify damages by granting retroactive annulment of the stay. In Ramirez, we held that a finding of willfulness is warranted if the creditor knew of the automatic stay, even if the creditor believed in good faith that it had a right to the property at issue. "Not even a good faith mistake of law or a legitimate dispute as to legal rights relieve a willful violator of the consequences of his act." id. at 589 (citation and internal quotations omitted).

While Ramirez remains good law on damages under § 362(h), it is inapplicable here. In determining whether retroactive annulment of the stay is warranted, the bankruptcy court must look to the totality of the circumstances. Nat'l Envtl Waste, 129 F.3d at 1055. The creditor's conduct (as well as the debtor's) is certainly a factor to be considered. id. Here, the bankruptcy court noted that CWR's and WMB's stay violation did not appear to willful, in that their actions were predicated on mistake, and they immediately attempted to rescind the sale once they learned of that mistake. While that might be insufficient to shield them from liability for damages in a § 362(h) action, it is relevant in determining whether retroactive relict is appropriate.

In her reply brief, Kraft argues that National Environmental Waste is inapplicable here because the debtor in that case was a corporation, and corporations are not entitled to damages for willful stay violations under § 362(h). However, Johnston Environmental Corp. v. Knight (In re Goodman), 991 F.2d 613, 620 (9th Cir. 1993) holds that while only

individuals may recover damages under § 362(h), an injured corporation may still recover damages for civil contempt. Kraft cites no authority for distinguishing between a corporate and individual debtor in determining whether retroactive relief is warranted, and we see no meaningful distinction.

Finally, Kraft argues that CWR and WMB should be barred by laches from obtaining relief from stay. She complains they waited almost two years before seeking retroactive relief, and only after Kraft had expended time and funds to bring the district court action. CWR and WMB point out that because the bankruptcy court had validated the sale as to Diversified, they did not believe they needed to seek relief, and they note that Kraft who did not appeal the bankruptcy court's order annulling the stay as to Diversified, waited nearly a year after the foreclosure sale before filing her suit for damages in district court.

In these circumstances, the bankruptcy court did not abuse its discretion in granting retroactive annulment of the stay, even taking into account CWR and WMB's delay in seeking it.

VI. CONCLUSION

This appeal is not moot.

The bankruptcy court did not abuse its discretion in granting retroactive annulment of the automatic stay; had faith in filing a chapter 13 plan, coupled with the prior annulment respecting the same sale on the purchaser's motion, suffice for relief, and Kraft has not shown that finding clearly erroneous.; We AFFIRM.

Footnotes

fn1 This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. 9th Cir. BAP Rule 8013-1.

fn2 Absent contrary indication, all section and chapter references are to the Bankruptcy Code, it U.S.C. §§ 101-1330.

Attorney or Party Name, Address, Telephone & FAX Numbers and California State Bar Number

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: EVELYN R. KRAFT aka EVELYN R. MCCLIMON, Debtor and PETER C. ANDERSON, Trustee.

CHAPTER: 7

CASE NO.: LA 98-24815-EC

DATE: JULY 25, 2000
TIME: 3:00 P.M.
CTRM: 1639

ORDER GRANTING MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (Real Property) (MOVANTS: CAL-WESTERN RECONVEVANCE CORPORATION and WASHINGTON MUTUAL BANK. N.A.)

1. The Stay Motion was: X Contested

2. The Stay Motion affects the following real property (the "Property"):
Street Address: 3504 West Estates Lane (fka 26002 Crenshaw) (aka Estates Lane)
Apartment/Suite no: Unit #315 (aka 315C)
City. State, Zip Code: Palos Verdes, California 90274

Legal description or document recording number (including county of recording):
X See attached page.

3. The Motion is granted under: X 11 U.S.C. § 362(d)(1) X 11 U.S.C. § 362(d)(2)

4. As to Movant, its successors, transferees and assigns ("Movant"). the stay of 11 U.S.C. § 302(a) is;
a. X Terminated as to Debtor and Debtor's bankruptcy estate.
b. X Annulled retroactively to the date of the bankruptcy petition filing on April 15, 1998.

T-5.# 1003615-02 EXHIBIT "A"

THE LAND REFERRED TO IN THIS GUARANTEE IS SITUATED IN THE UNINCORPORATED AREA). COUNTY OF LOS ANGELES, STATE OF CAUFORNIA. AND IS DESCRIBED AS FOLLOWS:

A CONDOMINIUM COMPRISED OF:

PARCEL 1: AN UNDIVIDED .4138% INTEREST IN AND TO:

LOT 1 OF TRAC TNO. 32133, AS PER MAP FILED IN BOOK 854, PAGES 68 TO 72. INCLUSIVE, OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

EXCEPTING THEREFROM UNITS 1 THROUGH 300, INCLUSIVE, AS SHOWN UPON THE CONDOMINIUM PLAN RECORDED FEBRUARY 16, 1979, AS INSTRUMENT NO. 79-196290, OFFICIAL RECORDS.

PARCEL 2:

UNIT 54, AS SHOWN UPON THE CONDOMINIUM PLAN REFERRED TO IN PARCEL 1 ABOVE.
Commonly known as: 3604 W. Estates Lane, 3315, Palos Verdes, CA

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number

MICHAEL R. SMENT, ESQ. SBN090949
LAW OFFICES OF MICHAEL R. SMENT
674 County Square Drive, Suite 108
Ventura, CA 93003
(805) 654-3011
Fax: (805) 984-2399

X Attorney for: Movant DIVERSIFIED PROPERTIES

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: EVELYN R. KRAFT
aka EVELYN R. MCCLIMON

CHAPTER: 7

CASE NO.: LA 98-24815-EC

DATE: December 22, 1998
TIME: 3:30 P.M.
CTRM: 1639
FLOOR: 16th

ORDER GRANTING MOTION FOR RELIEF
FROM THE AUTOMATIC STAY
UNDER 11 U.S.C. § 362 (Real Property)
(MOVANT: DIVERSIFIED PROPERTIES)

1. The Stay Motion was: XX Contested

2. The Stay Motion affects the following real property (The 'Property'):
Street Address: 3604 W. Estates Lane (aka Estates Lane) (fka 26002 Crenshaw
Apartment/Suite no.: Unit #315 (aka 315C)
City, State, Zip Code: Pales Verdes, California 90274

Legal description or document recording number (including county of recording):

X See attached page.

3. The Motion is granted under: X 11 U.S.C. § 362(d)(1) X 11 U.S.C. § 362(d)(2)

4. As to Movant, its successors, transferees and assigns ("Movant"), Vote stay of 11 U.S.C. § 3S2(a) is:

b. XX Annulled retroactively to the date of the trustee's sale (9/2/98) as to Debtor and Debtor's bankruptcy estate.

THE LAND REFERRED TO IN THIS GUARANTEE IS SITUATED IN THE (UNINCORPORATED AREA).

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

A CONDOMINIUM COMPRISED OF:

PARCEL 1: AN UNDIVIDED .4138% INTEREST IN AND TO:

LOT 1 OF TRAC TNO. 32133, AS PER MAP FILED IN BOOK B54, PAGES 5B TO 72, INCLUSIVE, OF MAPS. IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

EXCEPTING THEREFROM UNITS 1 THROUGH 300, INCLUSIVE. AS SHOWN UPON THE CONDOMINIUM PLAN RECOPOED FEBRUARY IC, 1979, AS INSTRUMENT NC. 79-196290, OFFICIAL RECOPDS.

PARCEL 2:

UNIT 54 AS SHOWN UPON THE CONDOMINIUM PLAN REFERRED TO IN PARCEL 1 ABOVE.

Commonly known as: 3604 W. Estates Lane, 3315, Palos Verdes, CA

5. X Movant may enforce its remedies to foreclose upon and obtain possession of the Property In accordance with applicable nonbankruptcy law, but may not pursue any deficiency claim against the Debtor(s) or property of the estate except by filing a Proof of Claim pursuant to 11 U.S.C. 501.

7. X Any post-petition acts taken after the effective date of this Order by Movant to enforce its remedies in accordance with applicable non-bankruptcy law against the Debtor(s) or properly of the estate shall not constitute a violation of the stay in this bankruptcy case.

10. This Court further orders as follows:

a. XX This Order shall be binding and effective in any bankruptcy case commenced by or against the Debtor(s) for a period of 180 days from the hearing of this Motion.

c. XX See Extraordinary Relief Attachment (Use Optional Form 351 ER) for additional provisions.

Dated: 12/30/02

United States Bankruptcy Judge

EXTRAORDINARY RELIEF ATTACHMENT
(MOVANT: DIVERSIFIED PROPERTIES)
(This Attachment Is the continuation page for paragraph 10 of the fore going Order)

Based upon evidence of efforts by Debtor(s) or others acting in concert with Debtor(s) to delay, hinder or defraud Mcvant by abusive bankruptcy filings, this Court further orders as follows:

1. X This Order Is binding and effective in any bankruptcy case commenced by or against any successors,

transferees, or assignees of the above-named Debtor(s) for a period of 180 days from the hearing of this Stay Motion

X without further notice.

5. X The Debtor(s) is/are hereby enjoined from transferring all or any portion of the Property for a period of 180 days from the hearing of this Stay Motion except as may be authorized by further order of this Court, and any transfer in violation of this Order

Judge's Initials

## STATUTES INVOLVED

Section 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided

under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.